

BEFORE THE NEBRASKA PUBLIC SERVICE COMMISSION

In the Matter of the Commission,	)	Application No. 911-013/PI-96
on its own motion, seeking to	)	
investigate collection and	)	ORDER OPENING DOCKET
remittance of enhanced 911	)	
surcharges by prepaid wireless	)	
carriers	)	Entered: April 19, 2005

**COMMENTS OF TRACFONE WIRELESS, INC.**

TracFone Wireless, Inc. (“TracFone”), hereby submits its comments in the above-captioned proceeding, and states as follows:

**INTRODUCTION**

TracFone provides prepaid wireless service on a resold basis throughout the United States and is a leading provider of prepaid wireless telecommunications services to Nebraska consumers. Unlike conventional Commercial Mobile Radio Service (CMRS) providers and wireline carriers, TracFone’s services are offered exclusively on a prepaid basis. TracFone customers in Nebraska typically purchase TracFone handsets as well as prepaid TracFone airtime from third party retail vendors including, for example, Wal-Mart, K-Mart, RadioShack, and Target. As a reseller of wireless services, TracFone does not own or operate any telecommunications facilities in Nebraska or elsewhere. Rather, TracFone acquires services for resale from more than thirty facilities-based wireless carriers like Verizon Wireless, Cingular, T-Mobile and others throughout the United States. Customers acquire service by purchasing prepaid quantities of airtime which are redeemed or “loaded” into the customers’ handsets by accessing TracFone’s Internet website ([www.tracfone.com](http://www.tracfone.com)) or by placing a toll-free call to TracFone and entering the required information to activate the service. TracFone customers

remain customers of TracFone only so long as they have unused unexpired usage stored in their handsets. Customers may continue to be customers only by purchasing additional prepaid usage.

Unlike the situation with traditional wireless service providers, no service contracts are executed between TracFone and its customers; customers are not billed for TracFone services. Neither do TracFone customers make any commitment to TracFone or incur any obligation to TracFone beyond the quantity of service purchased in advance by the customers. TracFone service is provided on a “pay-as-you-go” basis. In addition, TracFone rates are “all inclusive.” There are no hidden surcharges, fees, taxes, or other charges added to TracFone’s advertised per minute rates.

TracFone’s prepaid wireless service is unique for another reason: each customer’s account balance is stored in the customer’s TracFone handset, not in a carrier switch. This enables TracFone customers to determine on a real time basis how many of the customer’s prepaid minutes have been used, how many unused minutes remain available to the customer, and the date when those unused minutes will expire. While the customers have access to that remaining usage information on a real time basis, TracFone does not. Since TracFone does not own, operate or control a switch, it has no practicable means for monitoring customer usage of prepaid services or for debiting customer accounts to impose an E911 surcharge or any other tax or fee.<sup>1</sup>

As a provider of prepaid wireless service in Nebraska, TracFone has a profound interest in the issues regarding Nebraska’s Emergency Telephone Service and its E911 funding rules which have been raised in the instant proceeding. On April 8, 2005, TracFone sent to the Commission’s Enhanced 911 Wireless Department a letter setting forth its concerns about the

---

<sup>1</sup> The terms “Enhanced 911” and “E911” are synonymous.

manner in which Nebraska's Enhanced Wireless 911 Services Act is to be applied to prepaid wireless services.<sup>2</sup> TracFone invites the Commission and its Staff to review that letter as well as these comments. For the convenience of the Commission, Staff, and other interested parties, a copy of that letter is attached to these comments as Attachment 1.

By order entered April 19, 2005, the Commission commenced this docket to investigate the collection and remittance of enhanced 911 charges by prepaid wireless carriers. In that order, the Commission designated two issues for comment:

1. Whether prepaid wireless providers are required to collect and remit the Enhanced 911 surcharge?
2. How the prepaid wireless providers should collect the Enhanced Wireless 911 Surcharge from individuals purchasing their services?

In these comments, TracFone will address those designated issues. As will be explained in these comments, the Enhanced Wireless 911 Services Act,<sup>3</sup> and the Commission's rules implementing that act, as written, are not applicable to prepaid (non-billed) wireless services, such as the services provided by TracFone. Accordingly, prepaid wireless providers like TracFone are not required to collect and remit the Enhanced 911 surcharge. Moreover, any attempt by the Commission to stretch the limits of the Act and its rules so as to make them applicable to prepaid wireless services would convert the surcharge from a charge on the beneficiaries of the state's E911 system, *i.e.*, consumers of telecommunications services, to a tax on providers of those services. Such a conversion would be in contravention of the plain intent of the legislature in enacting the Enhanced 911 Wireless Services Act.

---

<sup>2</sup> Letter to Ms. Kara Thielen, Director, Enhanced 911 Wireless Department, Nebraska Public Service Commission, from Leighton W. Lang, Assistant General Counsel – State Regulatory Affairs, TracFone, dated April 8, 2005.

<sup>3</sup> Neb. Rev. Stat. §§ 86-442 to 86-469 (2002 Cum. Supp.) (the "Act").

**I. THE E-911 FEE REQUIREMENT AS CODIFIED IN THE ENHANCED WIRELESS 911 SERVICES ACT IS NOT APPLICABLE TO PREPAID WIRELESS SERVICES**

The starting point for determining whether the Act is applicable to prepaid wireless services such as those provided by TracFone is the Act itself. The surcharge requirement is codified at Section 86-457 which states as follows:

Each wireless carrier who has a subscriber with a billing address in Nebraska shall collect a surcharge of not more than fifty cents per month per access line. The wireless carrier shall add the surcharge to each subscriber's billing statement. The wireless carrier is not liable for any surcharge not paid by a subscriber and is not obligated to take legal action to collect the surcharge. The surcharge shall appear as a separate line-item charge on the subscriber's billing statement and shall be labeled as "Enhanced Wireless 911 surcharge" or a reasonable abbreviation of such phrase. The Commission may take any legal action as it deems necessary to collect unpaid surcharges in its own name, as a real party in interest, or by assigning such debt for collection to a third party.<sup>4</sup>

By its terms, the surcharge mandated by Section 86-457 is to be a surcharge on billed wireless services. Prepaid wireless services are, by definition, unbilled services – they are paid for in advance. Prepaid wireless customers are not sent bills by their providers since there is nothing for the provider to bill. The statute imposes the surcharge only on wireless service customers who have billing addresses in Nebraska. Prepaid wireless service customers who do not receive bills do not have billing addresses.<sup>5</sup> Moreover, the statute requires that the surcharge be added to each subscriber's billing statement, and that it appear as a separate line-item charge

---

<sup>4</sup> Nebr. Rev. Stat. § 86-457.

<sup>5</sup> In fact, TracFone does not even have mailing addresses for most of its customers. Customers are not required to provide address information at the time of purchase of a TracFone handset. When customers contact TracFone to activate their prepaid usage, TracFone asks the customers to provide address and wireline telephone number information so that TracFone may contact the customers to provide information regarding changes to the service and to notify customers when their prepaid usage is about to expire. However, there is no requirement that customers provide accurate or current address information, and many customers do not do so.

on the subscriber's billing statement. No other collection mechanism is provided for or contemplated by the statute.

Indeed, TracFone's customers are not "subscribers" to its prepaid wireless service in any generally understood meaning of the terms "subscriber" or "subscription." As noted above, there are no contracts executed between TracFone and its customers. Customers do not become obligated to utilize TracFone service for any specified period of time. Customers purchase quantities of prepaid usage, activate the service already purchased, and then use their prepaid service. Once the customer has utilized its quantity of prepaid usage or once the date for using the service has expired, the relationship between TracFone and the customer ceases unless and until the customer re-establishes the relationship by making additional purchases of prepaid usage. A purchaser of prepaid TracFone service is no more a "subscriber" to TracFone service than is a purchaser of a single issue of a newspaper or magazine from a news stand or convenience store a "subscriber" to that newspaper or magazine. In neither case is there any ongoing relationship between vendor or customer beyond the specific quantity of the product or service already purchased.

As described above, it is clear that the Act contemplates imposition of the E911 surcharge only on customers of billed wireless services. Had the legislature intended to impose surcharges on prepaid purchases of wireless services, different legislation could have been enacted.<sup>6</sup> However, by specifically tying the E911 funding obligation to billed wireless services

---

<sup>6</sup> At least one state – Hawaii – has enacted legislation which specifically exempts prepaid wireless from that state's E911 charge in recognition of the fact that the charge cannot be applied to prepaid wireless in a competitively neutral manner. Several states have enacted E911 funding legislation which specifically contemplates extension of the E911 funding obligation to prepaid wireless services, and which recognize that specific collection methods are necessary due to the special nature of prepaid wireless service. Examples of states which have enacted such legislation include Virginia (Code of Virginia § 56-484.12-18); Tennessee (Tenn. Code Ann. §

as specified at Nebr. Rev. Stat § 86-457, the legislature clearly articulated its intent that the costs of funding the state's E911 service shall be borne by billed subscribers to wireless services through line-items on their bills – not by providers of those services. Prepaid wireless service providers cannot collect E911 funds from their customers since they do not render bills to their customers and have no ability to impose or collect 911 charges at the point of sale of prepaid service.<sup>7</sup> Accordingly, pursuant to the express statutory language, prepaid wireless providers are not subject either to the requirement to collect or to pay the E911 surcharge.

The Commission's administrative regulations implementing the Act are consistent with the Act itself. The Commission's rules and regulations governing telecommunications are codified at Title 291 Chapter 5 of the Commission's rules. Section 005.02 of the Commission's telecommunications regulations requires wireless carriers who have subscribers with billing addresses in the state to collect the surcharge and to add the surcharge as a separate line-item on each subscriber's billing statement. The wireless carrier is not liable for any surcharge not paid by a subscriber, according to the rule. In addition, Rule 005.07 requires wireless carriers to remit the surcharge amounts collected from subscribers and to retain surcharge and remittance records for two years after the date of the subscriber's billing statement.<sup>8</sup>

---

7-86-018, as amended by House Bill No. 1473); Iowa (Iowa Code § 444). In addition, on May 4, 2005, the Public Service Commission of West Virginia dismissed an investigation into whether that state's E911 fee law was applicable to prepaid wireless. That Commission, faced with a statute quite similar to the Act, concluded that the law, as written, did not address prepaid wireless. A copy of the West Virginia Recommended Decision is attached hereto as Attachment 2.

<sup>7</sup> Even if prepaid wireless service providers had the ability to collect the E911 surcharge at the time of initial purchase (which they do not), such a collection method would be violative of the statutory requirement that the surcharge be collected through a line-item charge on bills sent to subscribers. Moreover, there is no way to compute or apply a monthly surcharge to the sale of prepaid airtime cards because the seller would not know if, when or for how long the prepaid service would be used in Nebraska.

<sup>8</sup> Nebraska Public Service Commission Rules, Title 291, Chapter 5, Section 005.07B.

That the Commission's E911 rules specifically require that the surcharge be collected from billed subscribers and identified as a separate line-item on subscriber billing statements corroborate what is apparent from the plain language of the Act itself: that the E911 surcharge is applicable only to billed wireless services. Neither the Act nor the Commission's regulations implementing the Act provide any basis in law for attempting to extend the surcharge to cover prepaid services – services for which no bills are rendered and for which there is no opportunity to recover the surcharges on a line-item basis as is required by applicable law.

## **II. EXTENSION OF THE E911 CHARGE TO PREPAID WIRELESS SERVICE PROVIDERS WOULD BE FUNDAMENTALLY INCONSISTENT WITH THE MANNER IN WHICH E911 CHARGES ARE RECOVERED FROM CUSTOMERS OF WIRELINE SERVICES**

In Nebraska, subscribers to wireline local telecommunications services are subject to similar surcharges for 911 service pursuant to the Emergency Telephone Communications Systems Act.<sup>9</sup> That act imposes on subscribers to wireline local exchange service a surcharge on every local exchange access line which physically terminates within the governing body's designated service area.<sup>10</sup> As with the E911 surcharge on wireless service imposed by the Act, the wireline local exchange surcharge is statutorily limited to billed service. Nebr. Rev. Stat. § 86-436(1) states, in relevant part, that “[e]very service user shall be liable for any service surcharge billed to such user until the surcharge has been paid to the service supplier.” (emphasis added). Subsection (2) states that “[t]he duty of a service supplier to bill a service surcharge to a service user shall commence at such time as may be specified by the governing body.” (emphasis added).

---

<sup>9</sup> Nebr. Rev. Stat. §§ 86-420 through 86-441.

<sup>10</sup> Nebr. Rev. Stat. § 86.433.

The Emergency Telephone Communications Systems Act – applicable to wireline local exchange service, like the Enhanced Wireless 911 Services Act – applicable to wireless service, reflects the intent of the Nebraska legislature that 911 service in the state be funded by surcharges imposed upon wireline and wireless service consumers which are billed to those consumers by their service providers.

**III. EXTENSION OF THE E911 FEE TO PREPAID CMRS SERVICES WOULD FUNDAMENTALLY CHANGE THE NATURE OF THE FEE, WOULD DISCRIMINATE AGAINST PREPAID CMRS PROVIDERS, AND WOULD NOT BE COMPETITIVELY NEUTRAL**

In enacting the Act, the legislature directed that billed customers of wireless services are to be subject to a monthly fee to support the provision of E-911 service. The regulations promulgated by the Commission are consistent with that objective. In considering whether the monthly E911 fee applies to the non-billed services of prepaid wireless providers, it is essential that the Commission and its Staff understand how such an extension could affect providers of wireless services as well as consumers of those services. Prepaid wireless providers including, for example, TracFone, have no means available to them to collect monthly charges from their customers. They do not render monthly bills and they have no means for collecting such charges.

In fact, when customers purchase quantities of prepaid airtime from TracFone, neither TracFone, the retailers, nor the customers know for how many months the customers will remain customers of TracFone. Once a TracFone customer exhausts his or her prepaid usage, that person has no right to continue to use TracFone's service unless and until the customer purchases additional usage. In short, at the time of purchase, neither TracFone nor its retail vendors have any means for determining whether the customer will remain a TracFone customer for six months or for six days. Thus, TracFone would not be able to impose a point-of-sale surcharge to



recover the monthly E911 fee since neither TracFone, the retailer, nor the customer would know at that time how many months the customer will be a TracFone customer. Moreover, the Act and the Commission's implementing rules do not authorize or require retail vendors who are not wireless service providers to collect E911 fees at the time of purchase.

Since TracFone and other similar resellers of prepaid CMRS services have no means to impose the monthly E911 fee on their customers, they would be unable to collect the charge from their customers, as explicitly contemplated by the Act and the Commission's rules. A Commission determination that those providers of prepaid CMRS services were nonetheless liable for the charge would leave those providers with no alternative other than to pay the charge themselves, since they would have neither the opportunity nor the ability to collect the charge from their customers. Given the fact that the Act and the Commission's regulations clearly impose the E911 charge payment obligation on the subscribers and the collection obligation on the providers, amendment of the statute and the rules would be necessary to redirect the payment obligation from customers to providers.

In considering whether to amend the law, the legislature and the Commission should realize that such an amendment would fundamentally change the nature of the E911 surcharge. If the law were changed so that the surcharge were to be imposed on service providers in the case of non-billed services, the fee would be converted from being a charge on consumers to being a carrier tax. Thus, the underlying premise of the wireless enhanced 911 surcharge that users of wireless services contribute to support of E911 systems would be replaced with a requirement that service providers rather than their users underwrite the cost of E911 systems through imposition of a tax (at least with respect to providers of prepaid wireless services).

In deciding whether to amend the Act and to promulgate new regulations to extend the E911 surcharge obligation to providers of prepaid wireless services or to impose a burdensome -- and in some instances, impossible -- billing or other collection mechanism on providers of prepaid wireless services, the legislature and the Commission respectively must remain mindful of the requirements of Section 253 of the Communications Act of 1934,<sup>11</sup> added to that Act by the Telecommunications Act of 1996.<sup>12</sup> Section 253(a) prohibits any state or local laws, regulations or other legal requirements which may prohibit or have the effect of prohibiting any entity from providing any interstate or intrastate telecommunications service.<sup>13</sup> Section 253(b) allows for certain “safe harbor” exceptions to the proscription of Section 253(a), including an exception to “protect the public safety and welfare.” However, that exception is a limited exception. Any requirement imposed by a state to promote the public safety and welfare must be imposed on a “competitively neutral basis.”

Imposition of an E911 funding requirement directly on providers of prepaid wireless services when such funding requirements are not imposed directly on providers of postpaid wireless services would materially increase the costs of providing prepaid service and would make it uneconomic to offer prepaid services. Thus, such a requirement could have the effect of prohibiting prepaid providers from offering wireless service in competition with postpaid providers. Even if such a requirement did not constitute a *de facto* prohibition against provision of interstate or intrastate telecommunications service in contravention of Section 253(a), there is

---

<sup>11</sup> 47 U.S.C. § 253.

<sup>12</sup> Pub. L. 104-104, 110 Stat. 56.

<sup>13</sup> See, e.g., Qwest Corporation v. City of Portland, et al., 385 F.3d 1236, at 1240-1241, (Ninth Cir. 2004) (“Section 253(a) preempts regulations that not only prohibit outright the ability of any entity to provide telecommunications services, but also those that may have the effect of prohibiting the provision of such services.”) (quoting City of Auburn v. Qwest Corporation, 260 F.3d 1160, 1175 (Ninth Cir. 2001)).

no question that such a requirement would violate the Section 253(b) requirement that state laws which protect the public safety and welfare must be competitively neutral. Any requirement that a prepaid wireless provider has to render monthly bills to its customers for what are otherwise prepaid, unbilled services would fundamentally alter the nature of prepaid wireless service and would make it impossible to offer such services in Nebraska. Such a requirement would therefore be subject to federal preemption pursuant to Section 253(d) of the Communications Act.

In short, an E911 surcharge which is imposed upon subscribers to postpaid wireless services but which is borne directly by providers of prepaid wireless service would not be competitively neutral. Since prepaid service providers have no ability to recover the E911 surcharges from their customers, they would only have two choices in order to comply: either they could incorporate the E911 surcharge in their rates thereby raising their per minute rates which would increase the perceived per minute price differences between prepaid and postpaid services, or they could absorb those charges themselves which would eat into their net revenues from provision of service. The first “choice” is not a choice at all. Most prepaid wireless providers, like TracFone, offer services throughout the United States and maintain nationally-uniform rate structures. There is no practicable way for carriers to charge different rates for service in different states. In short, it would be impossible for TracFone to recover the Nebraska E911 surcharge only from Nebraska consumers. Since those providers’ postpaid service competitors would not be forced either to raise rates (even if it were possible for them to do so) or to reduce their net revenues, the impact of the E911 charge on prepaid wireless providers would not be competitively neutral.

#### **IV. IMPOSITION OF THE E911 SURCHARGE ON PREPAID WIRELESS PROVIDERS WOULD NOT SERVE THE PUBLIC INTEREST**

As demonstrated in these comments, extension of the E911 surcharge to prepaid wireless services would be inconsistent with the Act and with the Commission's regulations implementing the Act. In addition to the legal infirmities described in these comments, any attempt to so extend the E911 surcharge should be rejected by the Commission as it would disserve the public interest.

Since the E911 surcharge is a flat charge based neither on consumption nor on ability to pay, the fees disproportionately impact lower income, lower volume consumers. TracFone's prepaid wireless services appeal to low volume, low income consumers including the credit-challenged, the elderly, minorities, immigrants, the unemployed, students, transients, and others who may be unable to obtain conventional postpaid wireless services or, in some cases, wireline local exchange services. Prepaid wireless services are also used by military personnel on temporary assignments who may not want to enter into lengthy service contracts or may not be able to afford them. TracFone offers services to such consumers for as little as \$8.00 per month. Imposition of a \$0.50 per month per customer surcharge – which cannot be collected from customers – would make it difficult, often impossible, for any prepaid wireless provider to serve those Nebraska consumers who could not otherwise afford wireless service. In this regard, the Commission should be aware that the regressive nature of state 911 fees was recently acknowledged by the National Black Caucus of State Legislators (NBCSL), which called on states to revise their tax and fee policies to make wireless service more widely available and affordable for low income consumers. A copy of NBCSL resolution 05-207 entitled "NBCSL Supports State and Local Government Policies to Make Wireless Telecommunications Services

Widely Available,” as adopted and ratified in December 2004, is attached to these comments as Attachment 3 for inclusion in the record of this proceeding.

### **CONCLUSION**

For the reasons described herein, the E911 surcharge as codified in the Act and the rules promulgated by the Commission to implement the Act is not applicable to providers of prepaid wireless services. Notwithstanding that legal conclusion, TracFone recognizes the importance of available, ubiquitous, and dependable E911 service throughout Nebraska and looks forward to working with the Commission and the legislature to develop and implement a E911 funding mechanism which complies with Section 253 of the Communications Act and which provides sufficient funds for E911 deployment without unduly burdening or disadvantaging any type of service provider or customers.

Respectfully submitted,

**TRACFONE WIRELESS, INC.**

---

Mitchell F. Brecher

GREENBERG TRAURIG, LLP  
800 Connecticut Avenue, NW  
Suite 500  
Washington, DC 20006  
(202) 331-3100

*Its Attorneys*

May 20, 2005

//226321